STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 16,424
	)	
Appeal of	)	

INTRODUCTION

The petitioner seeks to reopen the prior decision by the Human Services Board in Fair Hearing No. 14,543 denying his request to expunge a report of child sexual abuse from the child abuse registry maintained by the Department of Social and Rehabilitation Services (SRS). The issue is whether the petitioner has alleged sufficient factual and legal grounds for a new hearing.

DISCUSSION

This case first came to the Board on September 6, 1996, when the petitioner filed a request for fair hearing to contest the substantiation by SRS of a report of child sexual abuse by the petitioner against his daughter. A fair hearing (No. 14,543) was held on October 15, 1996, at which time the petitioner appeared *pro se.* The Department's evidence at that hearing consisted largely of the testimony and notes of its investigator who had interviewed the child, who was twelve years old when the reported incident had taken place in

December 1995. Following that hearing the hearing officer issued a Recommendation, dated October 23, 1996, that the record be expunged because the investigator's testimony at the hearing did not establish that sexual abuse had occurred.

The Board considered this Recommendation at its meeting on October 30, 1996. The petitioner did not attend this meeting. Following the meeting the hearing officer sent the parties the following Memorandum, dated October 30, 1996:

> The Board has voted to remand the above case for the taking of further evidence regarding the details of the petitioner's alleged fondling of his daughter. The case will be reset at which time the Department is expected to provide additional evidence on this issue, which could include the testimony of or a new interview with the alleged victim, or any other evidence the Department feels is appropriate to complete the evidence in this matter.

The actual remand order signed by the Board was sent to the petitioner on or shortly after November 1, 1996.

After timely written notice to the parties another hearing was held on December 3, 1996. The petitioner failed to appear and did not notify the Board regarding his nonappearance. At this hearing the Department introduced a tape recording of an interview with the alleged victim conducted on March 6, 1996. The Department also introduced the testimony of the police officer who had conducted that interview. Based on that evidence the hearing officer issued

a Revised Recommendation, dated January 8, 1997, recommending that the petitioner's request for expungement be denied.

The Board considered this Revised Recommendation at its meeting on January 15, 1997. Again, the petitioner did not appear. Following the meeting the Board issued an Order, dated January 17, 1997, that essentially adopted the findings and conclusions contained in the hearing officer's Recommendation.

Although the petitioner takes issue with the *content* of some of the documents he received from the Board during this time (see infra), there is no dispute in this matter that the petitioner received timely written notice of all hearings and Board meetings, and that he timely received copies of all hearing officer recommendations, Board orders, and rights of appeal. There is also no dispute that the petitioner did not notify the Board at any time regarding his failure to appear at any of the above proceedings and that he did not file an appeal following either of the Board's decisions in this matter.

The next thing the Board heard in this matter was a request filed April 5, 2000 by the petitioner's present attorneys that the case be reopened and the abuse report in question be expunged. The bases of the petitioner's request

were his claims of "procedural errors" in the Board's 1996-97 proceedings in the matter and that the petitioner had discovered "new evidence" that allegedly undermined the evidence the Board had relied upon in its earlier decision.

A status conference with the petitioner and the parties' attorneys was held on June 14, 2000, at which time the parties agreed that the matter would be continued for the Department to conduct a review of the petitioner's claims of procedural defects and new evidence, and to render a decision whether it would reconsider its (and the Board's) previous substantiation of sexual abuse.

It appears that the Department's review of the matter took nearly a year. On May 31, 2001 the Department notified the petitioner that it had determined that the alleged procedural defects and new evidence were not sufficient grounds to reconsider its position in the matter.

By letter dated June 29, 2001 the petitioner's attorneys notified the Board of the above decision by the Department and requested the Board to "take action" in the case. The letter indicated that petitioner would submit an updated memorandum in the matter by July 31, 2001.

On August 10, 2001 the petitioner filed a memorandum of law requesting a new hearing. The memorandum repeated (with

more detail and with extensive supporting documents) the allegations of procedural defects and new evidence contained in its original (April 5, 2000) filing. The memorandum also raised, for the first time, an allegation that the petitioner's daughter, who was then 18, had recently "recanted" her allegations of sexual abuse by the petitioner. (A copy of the petitioner's memorandum, dated August 9, 2001, is attached to Board members' copies of this Recommendation.)

It appears that the Department's response to this memorandum was delayed due to a medical leave by its attorney. On October 16, 2001 a new attorney for the Department filed a notice of appearance in the matter. On November 21, 2001 the Department requested a status conference, which was held by phone on December 12, 2001. At this conference the hearing officer advised the parties that he would not recommend that the matter be reopened solely on the basis of the petitioner's original allegations of procedural defects and new evidence. However, he indicated that the petitioner could present evidence that the victim had recently recanted her allegations. The parties then agreed that the Department would investigate the alleged recanting of the allegations by the victim and would notify the petitioner and the Board of its position.

By letter to the Board dated February 26, 2002 the petitioner admitted that the victim had recently *denied* to both the Department's and the petitioner's attorneys that she had recanted, and that in light of this the petitioner was requesting a hearing "for the limited purpose of taking evidence on whether (the victim) did in fact recant the abuse allegation". On March 6, 2002 the Board received a response from the Department opposing any further hearing in the matter.

By memos dated March 18 and April 4, 2002 the hearing officer directed the petitioner to file a written offer of proof including the names of all witnesses and a summary of all evidence on the issue of the victim's alleged recanting. With a cover letter dated April 15, 2002 the petitioner submitted the following Affidavit (dated April 12, 2002) as his "offer of proof" on this issue:

1. In May of 2001, I went to visit my daughter (C). At that time, she was living with her boyfriend, (J), at his father's home in Killington, Vermont. (C) and I had been working to rebuild our relationship since she turned 18.

2. Through e-mails and visits we had contact and successfully, but briefly, returned to a loving father-daughter relationship. Things were going well.

3. When I arrived to visit (C), she was not there yet and so I spoke with (J) and his father who were working on a car.

4. (C) arrived, greeting me with excitement and a loving hug. We visited throughout the afternoon, talking and catching up. Among the important things we discussed was that (C) believed she was pregnant. That day we bought her a pregnancy test and made her a doctor's appointment when it came up positive.

5. Since I smoke my fair share of cigarettes, (C) and I spent most of the day of the porch, but something began to trouble me. . . I worried, "Do (J) and his family know about the allegations against me? And, if so, do they believe them?"

6. So, by evening, after (J's) father had retired to bed, I had to have an answer to my questions. After all, (C) was going to have a baby with (J), and he could end up my son-in-law. I asked (C), in front of (J), if he and his family knew of the allegations. She informed me they did in fact know.

7. I then stated "It's important that (J) and his family know the allegations are not true." I only wanted to express how I felt about (J's) family knowing. I was not trying to force (C) to do or say anything about it. Nevertheless, she looked at (J) and myself and said, "they are not true". I did not pressure her in any way to say this. She said it freely without hesitation.

8. After that nothing more was said about it. (J) looked at me then he looked at her and it was over. Not wanting a confrontation over the issue we all mutually let it go. We continued to talk, and (J) and I even went to check out his truck in the garage.

9. (C) and I continued to have a relationship for a short time after that day. But contact ended when (D) found out I had visited with (C) and helped her make an appointment to see a doctor for her

> pregnancy. Soon she was living at home with her mother (D). She has, since, denied the recanting.

ORDER

The petitioner's request to reopen the Board's decision in Fair Hearing No. 14,543 or to be granted a new hearing is denied.

REASONS

As set forth in all the recommendations and orders in Fair Hearing No. 14,543 (see supra), 33 V.S.A. § 4916(h) provides:

> A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is not substantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under section 3091 of Title 3 on the application at which hearing the burden shall be on the Commissioner to establish that the record shall not be expunged.

(Emphasis added.)

The emphasized portion of the above statute makes clear that there is no limitation on the *time* in which an individual has to request an order of expungement from the Board. The statute does not, however, allow an individual to file an unlimited *number* of appeals regarding the same incident. The above provision does not undermine or create an exception to

the long-standing principle of *res judicata*, or claim preclusion. (See e.g., Russell v. Atkins, 165 Vt. 176, 179 [1996].) Therefore, any claim by the petitioner in this matter for further consideration of his case must meet established legal tests for either reopening an existing proceeding or being granted a new trial or hearing.

As noted above, the petitioner raises two main arguments in support of his request that the Board reconsider this matter. One alleges "procedural defects" in the Board's earlier proceedings. The other concerns alleged "new evidence". The latter consists of two categories. One is evidence allegedly discovered by the petitioner shortly after his 1996 hearings concerning the investigation that occurred at that time. The other is the alleged "recanting" of the allegations by the victim several years after the Board's decision in Fair Hearing No. 14,543. These arguments will be taken in turn.

I. Procedural Errors

The petitioner maintains that several aspects of the Board's notices and proceedings in Fair Hearing No. 14,543 deprived him of "due process". As noted above, the petitioner did not attend the Board meeting on October 30, 1996 at which the Board decided to remand the matter for further hearing.

The petitioner maintains that after he "prevailed at his first hearing" (in that he initially received a favorable Recommendation from the hearing officer) the language in the Recommendation advising him of the time and place of the Board meeting was insufficient to inform him of the nature and importance of that meeting. This argument fails scrutiny for several reasons.

First, it ignores the fact that at the time the petitioner received the initial notice of his fair hearing he, like every petitioner before the Board, also received a copy of the Board's Fair Hearing Rules. These rules, inter alia, clearly inform petitioners that following the fair hearing the Board will meet to consider the hearing officer's recommendation and that at this meeting the Board will "hear oral arguments in the case upon the request of either party". Rule No. 16. The rules also inform petitioners that:

> "Upon considering all of the facts and arguments in the case the board may adopt the recommendation of the hearing officer, or reject it and reach different conclusions on the basis of the evidence at hand, or refer the matter back to the hearing officer for a continuation of the hearing or for the receipt of additional evidence."
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> Rule No. 18.

As noted above, the petitioner, for whatever reason, failed to attend the October 30, 1996 meeting at which the

Board ended up remanding his case to the hearing officer for further hearing. However, in light of the above he cannot sincerely maintain that the Board's notices were "misleading" as to the nature and importance of that meeting.

However, even if the above notices did somehow mislead him, the petitioner's argument also ignores the facts (see supra) that *after* the Board meeting on October 30, 1996 he received all of the following—each of them in writing and in a timely manner: 1) a memorandum from the hearing officer explaining what had occurred at the meeting; 2) the Board's actual remand order; 3) a notice of the time and place of the remanded hearing; 4) the hearing officer's revised recommendation (which included a notice of the time and place of the next Board meeting); and 5) the Board's final order (which included a notice of the petitioner's right of appeal to the Vermont Supreme Court and the time limit in which to do so).

Despite all the above, the Board never heard from the petitioner from the date of his initial hearing until the filing of the instant appeal, three-and-a-half years later. In light of the foregoing, the petitioner's present claim that the Board's notices and procedures deprived him of due process is unconvincing, if not disingenuous.

The petitioner next raises the argument that during the proceedings in Fair Hearing No. 14,543 the hearing officer did not sufficiently provide procedural safeguards to him considering that he was appearing *pro se*. Unfortunately (due to the time in which it took the petitioner to file the instant appeal), the tape recordings of the hearings in Fair Hearing No. 14,543 no longer exist. However, as a matter of standard practice in *all* expungement hearings, *whether or not a petitioner is represented by counsel*, the hearing officers inquire at the outset if criminal proceedings are pending or likely; and they carefully advise petitioners of the fact that Human Services Board proceedings are separate matters and that statements made in these hearings can be used as evidence against petitioners in criminal proceedings. For this reason the hearing officers strongly urge all such petitioners to consider continuing their HSB appeal until after their criminal cases are resolved. In this case, there is no reason to believe that the petitioner did not receive these customary warnings from the hearing officer.

The above notwithstanding, the initial hearing notices the Board sends to *all* petitioners, as well as the Board's rules, include specific advice as to the petitioner's right to have an attorney. In this petitioner's case, the record shows

that the initial notice of hearing not only provided this information, but also included the address and telephone number of the Vermont Lawyer Referral Service. In addition to the above, the hearing officers also make it a point to orally advise all *pro se* petitioners in this type of case of the advisability of having counsel. The hearing officers also customarily and routinely grant continuances to petitioners who indicate they would like to try to get legal advice.

Whether or not the petitioner received, heeded, or understood the above notices and oral advice, the record in this case indicates that the petitioner *was* represented by an attorney in a related criminal case (see infra) that was proceeding concurrently. In light of this, and considering all the foregoing discussion regarding notices, the petitioner cannot plausibly claim that his rights as a *pro se* appellant were not sufficiently protected.

Finally, and even less convincingly, the petitioner maintains that he was unaware until recently that the proceedings in Fair Hearing No. 14,543 concerned the fact that his name would be placed in the SRS registry. If so, it would have to be concluded that the petitioner did not bother to read either of the two written recommendations of the hearing officer or the Board's final order in the matter. All three

of those decisions not only fully set forth the issues in the proceedings but they recited the registry statute, 33 V.S.A. § 4916(a), verbatim in its entirety.

II. New Evidence from 1996

The petitioner has provided the Board with extensive documentation of evidence that was introduced at or gathered pursuant to his criminal trial in 1996 and 1997, which apparently resulted in his acquittal. The petitioner does not allege, however, that this evidence was unavailable at the time of the hearings in Fair Hearing No. 14,543 or that with due diligence it could not have been discovered at that time. Nonetheless, the hearing officer has reviewed all the documentation submitted by the petitioner. Without exception, in its most favorable light it provides only arguable grounds to discredit or disbelieve the evidence that formed the basis of the Board's decision in Fair Hearing No. 14,543. Nothing in the documents contains any first hand knowledge of the abuse incident in question or directly or indirectly refutes or contradicts the victim's statements that formed the basis of the Board's findings in that matter.

The petitioner is clearly outside the one year limit placed on setting aside judgements in civil matters based on "newly discovered evidence." V.R.C.P. 60, Perrott v.

Johnston, 151 Vt. 464 (1989). The Vermont Supreme Court has repeatedly articulated the following five-part test to determine whether a *criminal* defendant has grounds for a new trial based on "newly discovered evidence":

> (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; (4) that it is material to the issue; [and] (5) that it is not merely cumulative or impeaching.

See e.g., State v. Webster, 165 Vt. 55, 59-60 (1996). "The test is a stringent one, and all the factors must be met." State v. Smith, 145 Vt. 121, 131 (1984). And even then, "a new trial is granted only with great reluctance and with special care and caution." State v. Jackson, 126 Vt. 250, 252 (1967).

Applying the above test to the evidence proffered by the petitioner in this case, it appears that only Nos. (2) and (4) are met. No. (1) is, at best, problematic, but need not be considered further.[1] This is because Nos. (3) and (5) are clearly not met.

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[1] Although it may well be argued that this evidence would at least cast a *reasonable doubt* as to the credibility of the victim's statements, the hearing officer, were he required to do so, would not conclude that the proffered evidence will "probably change the result" in this proceeding, where the burden of proof is a preponderance of the evidence. As the Vermont Supreme Court has noted, this part of the test is "particularly difficult. . . because it requires the probability of a different result,

As for No. (3) of the test, other than the fact that he was not represented by an attorney, the petitioner has made no showing or claim that this evidence was unavailable to him at the time of his fair hearing. As noted above, the petitioner *was* represented by an attorney in his concurrent criminal trial. Moreover, he had the option (see supra) to continue his expungement hearing until after the criminal trial was completed. It may be unfortunate that the petitioner elected to proceed with his expungement hearing and did not discover this evidence until shortly afterward, but under the circumstances (see supra) it is hardly unfair or unreasonable to conclude that the evidence could readily have been discovered beforehand.

Perhaps the biggest problem for the petitioner, however, is that all of the proffered "new evidence" (again, considered in the light most favorable to the petitioner) can at best be construed as "merely impeaching" of prior evidence, not evidence that directly, or even indirectly, addresses the underlying factual issue in the case—i.e., whether the abuse occurred. The petitioner, himself, describes this evidence as demonstrating "inconsistencies and credibility issues". Case

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not simply a possibility of a different result. State v. Webster, Id. at 60, quoting State v. Miller, 151 Vt. 337, 339 (1989).

law is particularly strict on this point. See e.g., State v. Jackson, Id. at 254 ("[a]pplication for a new trial will be denied where it appears that the only tendency of newly discovered evidence is to impeach, contradict, or discredit the prosecuting witness"). In light of this, it must be concluded that part (5) of the above test is not met.

In his arguments the petitioner points out the burdens, real and potential, of being identified in the SRS registry as a perpetrator of child sexual abuse. It bears pointing out, however, that the above test for a new trial is applied in *criminal* trials where the burden of proof is significantly greater and where the consequence of not considering new evidence (i.e., not disturbing the underlying conviction and sentence) usually poses much more harm to a defendant than the harm to a petitioner in an administrative expungement proceeding that is not reopened. The petitioner in this case has certainly made no legal or policy argument that the Board should adopt a standard that is *less* stringent than the one applied by courts in criminal proceedings.

III. The Victim's Alleged Recanting

To be sure, new evidence in the form of credible testimony *by the victim* of child sexual abuse that she recants the statements that were the primary basis of the

substantiation of child abuse might well merit a new hearing. See State v. Briggs, 152 Vt. 531, 541-542 (1989). However, the only offer of proof by the petitioner on this issue is something entirely different—i.e., *his own* testimony that *on one occasion* the victim told *him*, (allegedly also in the presence her boyfriend) that the allegations were "not true". Allegations of this type have been unequivocally rejected as a basis for granting a new trial. State v. Jewett, 150 Vt. 281, 285 (1988). Moreover, by the petitioner's own admission, the victim in this case *now* denies ever recanting her earlier statements. At best, the petitioner's allegation is "merely impeaching", and thus does not meet part (5) of the above test.

It also cannot be concluded that the petitioner's allegation, even if believed, would "probably change the result" of this case (see part (1) of the above test). There are many plausible reasons why the victim, who is now an adult, may have told *the petitioner*, especially in the presence of her boyfriend, that the allegations of abuse were not true. Therefore, it is highly doubtful that the mere fact that she may have said this to the petitioner on one occasion could form the basis of a finding that her previous statements were not true. To reopen a child abuse determination solely

on the basis of such a self-serving allegation would not only be contrary to well established law (see supra), but would also create a dubious and potentially harmful precedent as a matter of social policy—i.e., exposing victims of child abuse to repetitive hearings and further confrontations with their abusers.

For all the above reasons the petitioner's request to reopen the Board's decision in Fair Hearing No. 14,543 or to be granted a new hearing is denied.

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